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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 477

NOAH BEST, ADMINISTRATOR OF THE ESTATE OF Albert Edward Best, deceased, petitioner

vs.

DISTRICT OF COLUMBIA, RESPONDENT

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

STATEMENT

The petitioner's case rests entirely upon the facts contained in the opening statement to the jury (R. 9). The Supreme Court of the District of Columbia held these insufficient to warrant a submission of the case. The Court of Appeals affirmed this judgment.

Petitioner's counsel advised the court by the opening statement that he would prove the following facts: (1) that this place (wharf) was not fenced; (2) that the wharf contained holes and that the petitioner's intestate fell through one of the holes; (3) that children used this place to play on and play in; and (4) that the District, having

maintained the wharf in such a condition that it was dangerous to the life of children, was thereby responsible for children having been attracted there; (5) that there was a barrier close to the street and a watchman arrived after the accident. The opening statement did not contain any assertion that the District of Columbia permitted children to play on the wharf. It further disclosed that the wharf is no part of the public highway; that it is located on private property of the District of Columbia and is not a place to which the public is admitted but one where boats dock and unload sand, which is removed by the District. Nor did counsel in his opening statement advise the court that children could see the wharf from the public highway.

ARGUMENT

I

THERE IS NO CONFLICT BETWEEN THE DECISION OF THE COURT OF APPEALS AND THE DECISIONS OF THE FEDERAL CIRCUIT COURTS

There is no conflict between the decision of the Court of Appeals and the various circuit courts of appeals on the doctrine of attractive nuisance. Thus the following cases when analyzed are in accordance with the doctrine and principles announced by this Court and followed by the Court of Appeals.

Cole vs. *Penna. R. Co.* (C.C.A. 2), 43 F. (2) 953, 955.

Consol. L. & Z. Co. vs. *Corcoran* (C.C.A. 10), 37 F. (2) 296, 297, 298.

So. Pac. Co. vs. *Marquez* (C.C.A. 9), 44 F. (2) 286, 287.

In *Consolidated Lead and Zinc Co.* vs. *Corcoran*, 37 F. (2) 296, the facts disclose that the plaintiff was injured due to the carelessness of the defendant in permitting a transformer house and equipment to remain open when same had not been used for several months, and permitted children to play in the said house, which was located within a few feet of a public road and a short distance from a public school. There was no watchman present to advise the children of the high-tension wires and the danger thereof. There was no fence between the roadway and the transformers. In the case at bar there was a barrier, or fence, between the highway and the private property, and there was a watchman stationed at the yard, who was not present at the time of the accident, due to the fact that it occurred early on Sunday morning. The only persons lawfully admitted to the District wharf were those having business there.

In *Cole* vs. *Penna. R. Co.* (C.C.A. 2), 43 F. (2) 953, 955, the case was one to recover damages for the destruction of the plaintiff's property by a fire caused through the negligent act of the railroad company in the operation of its engines and maintenance of its right-of-ways. This case is absolutely valueless on the proposition of attractive nuisance. The opinion does not discuss this doc-

trine and a mere reference to the facts will disclose its complete inapplicability to the question presented by the petition herein.

The case of the *Southern Pacific Co.* vs. *Marquez,* (C.C.A. 9), 44 F. (2) 286, 287, was one for damages for injuries sustained by an infant plaintiff on a railroad turntable which was located 40 or 50 feet from a public highway and in plain view thereof. The facts in that case are so dissimilar to the ones presented by the record in this case that conceding, without admitting, that the decision was correct in that case, it it not in conflict with the decision of the Court of Appeals in the case at bar, nor controlling upon the question.

The Courts have consistently refused to permit recovery for injuries sustained by an infant who enters the land of another and is injured or meets his death by reason of the storage of articles upon the land, or the presence of water, artificial or natural, on the property of the landowner.

II

THE QUESTION PRESENTED BY THE PETITION FOR A WRIT OF CERTIORARI IS SOLELY A LOCAL ONE, AND THE DECISION OF THE COURT OF APPEALS IS NOT OF SUCH IMPORTANCE THAT THIS COURT SHOULD GRANT A WRIT OF CERTIORARI

The Court of Appeals in its opinion in this case adhered to its former decisions in cases on the so-called doctrine of "attractive nuisance." The prior decisions of the Court of Appeals, which held nonliability in cases of attractive nuisance, are:

Sullivan vs. *Huidekoper,* 27 App.D.C. 154.

McGraw vs. *District of Columbia,* 3 App. D.C. 405.

Hegeage vs. *District of Columbia,* 42 App. D.C. 109.

Branan vs. *Wimsatt,* 54 App.D.C. 374.

The *Sullivan* vs. *Huidekoper case,* supra, was decided subsequent to the decisions of this Court in the "turntable" case, *Sioux City and P. R. Company* vs. *Stout,* 17 Wall. 657, 21 L. ed. 745, and the "slack pit" case, *Union P. R. Co.* vs. *McDonald,* 152 U.S. 262, 38 L. ed. 434. In its opinion the Court of Appeals discussed in detail the turntable and slack pit cases, and held that the decisions of this Court did not apply to the facts in the case under consideration. The Court of Appeals also reviewed and quoted with approval from the following Federal and State cases:

McCabe vs. *American Woolen Co.,* 124 Fed. 283.

Peters vs. *Bowman,* 115 Cal. 345.

Stendal vs. *Boyd,* 73 Minn. 53, 42 L.R.A. 288.

Gillespie vs. *McGowan,* 100 Pa. 144, 45 Am. Rep. 365.

The decision of the Court of Appeals in the *Branan* vs. *Wimsatt case,* supra, was decided subsequent to the decision of this Court in the case of *United Zinc Co.* vs. *Britt,* 258 U.S. 268.

The Court of Appeals in all of its decisions has consistently held that there was no liability upon

a defendant property owner where a child, being a trespasser, was injured while playing upon the property of defendant.

The two recent decisions of this Court, *United Zinc and Chemical Company* v. *Britt*, 258 U.S. 268, and *N. Y. N. H. & H. R.R. Co.* v. *Fruchter*, 260 U.S. 141, both hold the defendant not liable where the plaintiff, a minor, was injured. The Britt case is a great deal more in point with the case at bar. The plaintiff's intestate there met his death while wading in a pool of clear water approximately one hundred feet from the roadway. The Court, at page 275 said, "infants have no greater right to go upon other people's land than adults, and the mere fact that they are infants imposes no duty upon land owners to expect them and prepare for their safety."

In the *Fruchter case, supra,* this Court held that the Railroad Company charged with the maintenance of a bridge was not responsible for an accident occurring to a child eight years of age who was injured while climbing upon the same.

From a careful consideration of the above cases as well as the recent decision of the Court of Appeals in the *Branan* v. *Wimsatt case,* 54 App. D.C. 374, it may now be safely said that the courts have limited the doctrine of attractive nuisance to "turntables" and "slack pits." Justice Holmes, in the *Britt case,* in referring to the "turntable" case said:

> "But the doctrine (turntable) needs very careful statement not to make an unjust and impracticable requirement."

and also, on page 276, the Court said:

> "there can be no general duty on the part of a land owner to keep his land safe for children, or even free from hidden dangers, if he has not directly or by implication invited or licensed them to come there."

To hold the municipality liable in this case would, in effect, require the entire water front along the Potomac River, as well as both sides of the Eastern Branch and the Chesapeake and Ohio Canal to be boarded off, with a guard stationed at each entrance to the enclosure. It is submitted that a building in the course of construction is just as attractive to children as a wharf. It is a place where they may play and "take chances." Every contractor and builder must erect a substantial fence around the construction work if the appellant is to be permitted to recover in this case.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari be denied.

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